Supreme Court, U.S.
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No. 96-1586

In The

Supreme Court of the United States

October Term, 1996

MANFRED KRUGER and CRISTINA KRUGER,

Petitioners,

vs.

SONIC RESTAURANTS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court will address an issue that was not raised in, or decided by, the district court or the United States Court of Appeals for the Tenth Circuit.

LIST OF INTERESTED PARTIES

The Petitioners are Manfred Kruger and Cristina Kruger.

The Respondent is Sonic Restaurants, Inc. (the caption of Petitioners' Petition inaccurately identifies Respondent as "Sonic Restaurants Inc."). Sonic Restaurant, Inc.'s parent company is Sonic Corp. Sonic Restaurant, Inc.'s affiliate is Sonic Industries Inc. (a separate wholly-owned subsidiary of Sonic Corp.).

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent ("Sonic") respectfully submits its Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioners (the "Krugers"). As is discussed in greater detail *infra*, Sonic respectfully requests that the Court deny the Krugers' Petition which seeks review of an opinion of the United States Court of Appeals for the Tenth Circuit (Case No. 96-6193, Order and Judgment filed January 7, 1997).[1]

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

The Krugers' Petition arises from the Tenth Circuit's opinion affirming the district court's entry of summary judgment in favor of Sonic and against the Krugers. The following brief summary of the factual background of this matter is presented to illustrate that "compelling reasons" necessary to support a writ of certiorari are not present.

Sonic initiated the action in the district court based on an unambiguous written agreement between Sonic and the Krugers. Sonic is involved in the retail food

[1] For the convenience of the Court and ease of reference, all citations to the Tenth Circuit's Opinion are to the Opinion attached as Appendix "A" to the Krugers' Petition [e.g., "Petition, App. A, p. ___"].

service industry. Manfred and Cristina Kruger are husband and wife. Mr. Kruger was an independent contractor of Sonic. Business differences arose between Mr. Kruger and Sonic. Sonic and Mr. Kruger terminated their business relationship and executed a written agreement entitled "Termination of Independent Contractor Services and Release of Claims" (the "Termination Agreement").

The Krugers received valuable benefits from Sonic under the Termination Agreement including, but not limited to, cash payments totalling $11,000.00 and forgiveness of a disputed amount of $15,000.00 allegedly owed by Mr. Kruger to Sonic. The Krugers made contractual commitments to Sonic in the Termination Agreement. The Krugers' commitments included, but were not limited to, a comprehensive release in favor of Sonic and acknowledgment of Mr. Kruger's previous status as an independent contractor.

The Krugers readily accepted the benefits of Sonic's performance under the Termination Agreement, then blatantly renounced their own contractual commitments to Sonic. Less than a month after signing the Termination Agreement and receiving payment from Sonic, the Krugers notified Sonic that they considered the Termination Agreement to be null and void. Sonic then filed the action in the district court to obtain a judicial determination of the parties' legal relationship and status, including the validity of the Termination Agreement and release. Sonic also sought to recover money damages associated with the Krugers' breach of the Termination Agreement and injunctive relief prohibiting future breaches by the Krugers, all as expressly provided for in the Termination

Agreement. The Krugers' attempts to assert various counterclaims against Sonic were dismissed by the district court.

Sonic asked the district court to determine whether the Termination Agreement was valid and binding on the parties. The district court granted Sonic's motion for summary judgment, finding that the Termination Agreement and accompanying release were valid and that the Krugers had breached the Termination Agreement in a manner that entitled Sonic to recover money damages and injunctive relief.

The Krugers appealed the district court's decision to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the district court's decision, finding that all of the Krugers' arguments lacked merit. *See*, Petition, App. A, p. 6a.

B. Correction of Misstatements in the Petition.

The Tenth Circuit's opinion correctly summarizes the facts of this case. The opinion focuses on the issue of whether the district court, based on the record before it, correctly granted summary judgment to Sonic and found the Termination Agreement valid and enforceable. Pursuant to United States Supreme Court Rule 15.1, Sonic addresses the following misstatements contained in the Krugers' Petition.

The Tenth Circuit's opinion correctly concludes that Mr. Kruger's work status (independent contractor or employee) is irrelevant to the issues presented for review. For this reason, the Krugers' numerous misstatements

concerning their alleged employment with Sonic are not addressed by this Brief in Opposition. The Krugers' misstatements concerning the circumstances surrounding execution of the Termination Agreement are addressed as follows.

The Termination Agreement was the result of numerous demands and threats of legal action made by Mr. Kruger after Sonic terminated his role as an independent contractor. In the course of his pre-Termination Agreement demands and threats, Mr. Kruger advised Sonic that he had consulted with legal counsel concerning his rights and legal remedies against Sonic. Rec., Vol. V, Doc. No. 47 [Part II, ¶10 (p. 4)].[2] The Krugers and Sonic ultimately agreed to resolve their differences and executed the Termination Agreement.

The Krugers were given the opportunity to review, discuss, consider and negotiate the terms and provisions of the Termination Agreement prior to its execution. Rec., Vol. V, Doc. No. 47 [Part II, ¶2 (p. 3)]. The Krugers did not express to Sonic any disagreement with or reluctance in executing the Termination Agreement. The Krugers did not request additional time from Sonic to review, discuss and consider the terms and provisions of the Termination Agreement prior to its execution. Rec., Vol. V, Doc. No. 47 [Part II, ¶3 (p. 3)].

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[2] Reference is made to the record on appeal as presented to the Tenth Circuit (by volume and the district court's docket sheet number).

The Krugers mischaracterize the nature and content of the Termination Agreement.[3] The Krugers erroneously identify the "main thrust" of the Termination Agreement as characterizing the Krugers' work status as independent contractors. Petition, p. 7. The Krugers ignore the undisputable fact that the Termination Agreement arose directly from Mr. Kruger's repeated threats of legal action against Sonic. The title of the Termination Agreement itself includes the words "Release of Claims". Contrary to the Krugers' contention, the true "main thrust" of the Termination Agreement is the settlement of disputed claims.[4]

C. Facts Showing that the Krugers' Primary Issue Was Not Raised or Addressed Below.

The primary issue purportedly presented by the Krugers' Petition is whether a federal court may enforce a contract which requires the commission of a federal crime. Petition, p. i. The Krugers' Petition erroneously

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[3] For example, the Krugers grossly mischaracterize the liquidated damages provision of the Termination Agreement. The Krugers erroneously state that the Termination Agreement provides for liquidated damages in the event the Krugers file for unemployment or disability benefits. Petition, p. 8. The liquidated damages provision does not even mention unemployment or disability benefits. The liquidated damages provision merely informs the Krugers of the financial consequences of any breach of the Termination Agreement. Petition, App. B (Exhibit "A" thereto), p. 20, ¶12.

[4] The Tenth Circuit opinion characterizes the Termination Agreement as a "negotiated compromise" and an "agreement intended to settle disputed obligations". Petition, App. A, pp. 3a-4a.

states that they argued in the district court that the Termination Agreement forces them to commit a criminal act. Petition, p. 9. The Krugers have not and cannot cite the Court to any presentation of such issue in the record which was before the district court on Sonic's motion for summary judgment.

The Krugers appealed the district court's decision to the Tenth Circuit Court of Appeals. The only three issues presented by the Krugers to the Tenth Circuit were: (1) whether the Termination Agreement is invalid based on lack of consideration; (2) whether the Termination Agreement is invalid based on duress; and (3) whether the district court erred in granting summary judgment to Sonic.[5] The Tenth Circuit affirmed the district court, finding that summary judgment was properly entered in favor of Sonic and rejecting the Krugers' consideration and duress contentions.

The Krugers raise two issues in this Court. The first issue is whether a federal court may enforce a contract which requires the commission of a federal crime (the "crime issue"). The second issue is whether a federal court may grant a motion for summary judgment when there is a disputed material fact (the "summary judgment issue"). The summary judgment issue was raised in, and decided by, the Tenth Circuit. The crime issue was not raised in, or decided by, the Tenth Circuit. This Court's

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[5] The Krugers' presentation of issues for review to the Tenth Circuit are contained in their Opening Brief filed in the Tenth Circuit on July 16, 1996 [p. 5, ¶3(A) (lack of consideration); p. 7, ¶3(B) (duress); p. 12, ¶7 (summary judgment)].

review of the Krugers' Petition should properly be limited to the summary judgment issue.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE KRUGERS' PETITION FAILS TO PRESENT COMPELLING REASONS TO JUSTIFY A WRIT OF CERTIORARI.

Review on a writ of certiorari is not a matter of right and will be granted only for compelling reasons. United States Supreme Court Rule 10. This Court's Rules specifically address considerations governing review on certiorari and indicate the character of "compelling reasons" considered by the Court on a petition for a writ of certiorari. United States Supreme Court Rule 10(a)-(c). The Krugers' Petition fails to present any compelling reasons which justify a writ of certiorari and should be denied.

The Krugers' Petition attempts to present an issue within one of the categories of potential "compelling reasons" recognized by this Court's Rules. United States Supreme Court Rule 10(a) provides that a "compelling reason" which may justify a writ of certiorari includes a situation where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." United States Supreme Court Rule 10(a). The Krugers' Petition fails to meet this standard in two respects. First, the contract and summary judgment issues addressed and ruled on by the Tenth Circuit do not constitute a sufficiently "important matter" to justify a

writ of certiorari. Second, the Tenth Circuit's decision does not conflict with the Seventh Circuit's decision in *U.S. v. Jungles*, 903 F.2d 468 (7th Cir. 1990).

Certiorari decisions typically involve issues of public importance and uniformity of federal law. *See*, 16B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4004.1 (1996). Examples of important matters which warrant consideration on certiorari include the constitutionality of a federal statute,[6] constitutionality of a state court injunction which creates a conflict between the state's highest court and a federal appellate court,[7] a question of Sixth Amendment law,[8] and the existence and scope of an aiding and abetting action under a federal securities statute.[9] The issues raised by the Krugers' Petition do not present important matters or compelling reasons for the issuance of a writ of certiorari.

II. THIS COURT SHOULD REFRAIN FROM EXERCISING ITS CERTIORARI JURISDICTION TO CONSIDER THE "CRIME ISSUE" PRESENTED BY THE KRUGER'S PETITION.

As discussed *supra*, the Krugers improperly attempt to present an issue in this Court which they failed to

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[6] *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426, 113 S.Ct. 2696, 2703, 125 L.Ed.2d 345 (1993).

[7] *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 2523, 129 L.Ed.2d 593 (1994).

[8] *Nichols v. U.S.*, 511 U.S. 738, 114 S.Ct. 1921, 1925, 128 L.Ed.2d 745 (1994).

[9] *Central Bank v. First Interstate Bank*, 511 U.S. 164, 114 S.Ct. 1439, 1444, 128 L.Ed.2d 119 (1994).

present to the district court and Tenth Circuit. An issue that is raised for the first time by a petition for writ of certiorari cannot be considered.[10] The Krugers' failure to present their purported crime issue to the district court and Tenth Circuit should preclude this Court's consideration of such issue in connection with the Krugers' Petition.

III. THE TENTH CIRCUIT'S OPINION DOES NOT CREATE A CONFLICT WITH THE SEVENTH CIRCUIT ON A COMMON ISSUE.

Assuming *arguendo* that the Krugers had first raised their crime issue below, a writ of certiorari would still not be warranted. The Krugers inaccurately contend that the Tenth Circuit's opinion creates a conflict with the Seventh Circuit on the issue of the enforceability of a contract such as the Termination Agreement. The Krugers rely on the Seventh Circuit's decision in *U.S. v. Jungles*. The Krugers' reliance on *Jungles* is misplaced in two respects. First, the issue in *Jungles* is different than that addressed by the Tenth Circuit. Second, *Jungles* does not address the crime issue which the Krugers improperly attempt to raise for the first time in this Court.

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[10] *Gray v. Netherland*, ___ U.S. ___, 116 S.Ct. 2074, 2082, 135 L.Ed. 2d 457 (1996) ("[i]f the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it"); *U.S. v. Ortiz*, 422 U.S. 891, 898, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975). *See also, Oklahoma Tax Commission v. Chickasaw Nation*, ___ U.S. ___, 115 S.Ct. 2214, 2219, 132 L.Ed.2d 400 (1995).

As discussed *supra*, three issues were presented to and addressed by the Tenth Circuit: (a) whether the Termination Agreement is invalid due to a lack of consideration; (b) whether the Termination Agreement is invalid due to duress; and (c) whether the district court erred in granting summary judgment against the Krugers. *Jungles* involved the appeal of a criminal conviction for tax evasion. *Jungles* did not involve the issue of the validity of a contract such as the Termination Agreement. *Jungles* did not involve the issue of whether summary judgment was properly granted. The Krugers' characterization and description of the Seventh Circuit's decision in *Jungles* is substantially and significantly inaccurate. The Krugers erroneously state that the Seventh Circuit in *Jungles* held that a contract similar to the Termination Agreement was void because it could be considered to be evidence of a criminal act. Petition, p. 10.

The Seventh Circuit in *Jungles* affirmed a worker's criminal conviction for failure to file tax returns and tax evasion. The worker in the criminal prosecution had been employed by a family business for fifteen years and, during that time, his employer had withheld taxes from his wages. After fifteen years, the worker decided that he no longer wanted to pay taxes. The worker created and implemented a scheme to conceal his assets and income from the taxing authorities. The worker created and had his employer sign an "Independent Contractor Agreement" which defined the worker as an independent contractor and specified that the employer was no longer required to withhold wages of the worker for federal income tax purposes. The employer testified that, in his opinion, the agreement was a sham and its sole purpose

was to avoid having taxes withheld. The worker also changed the way his weekly paychecks were issued (no longer in his name, but that of a trust). The worker additionally directed his employer to remove his social security number from all tax reports sent by the employer to the Internal Revenue Service. The employer complied with the worker's request and sent a letter to the Internal Revenue Service explaining the reason for its deletion of the workers' social security number.

Not surprisingly, an investigation was initiated and indictments were ultimately issued against the worker for failure to file returns and tax evasion. The worker represented himself at his criminal trial and focused his defense on his alleged status as independent contractor. The worker unsuccessfully contended that the company was the party responsible for payment of taxes, not him. The worker also contended that the independent contractor agreement, as the only evidence of an affirmative act of tax evasion, was insufficient to warrant a conviction.

The worker was convicted in the district court and his conviction was affirmed by the Seventh Circuit. The issues presented by the worker on appeal to the Seventh Circuit were: (a) whether the government's evidence at trial was sufficient to support his conviction for tax evasion; (b) whether various trial court rulings and prosecutorial actions deprived him of a fair trial; and (c) whether his sentence was imposed in violation of his due process rights. 903 F.2d at 472-73.

The worker in *Jungles* did not present, and the Seventh Circuit did not address, issues concerning the contractual validity and enforceability of the independent

contractor agreement created by the worker to implement his tax evasion scheme. The worker in *Jungles* did not present, and the Seventh Circuit did not address, the issue of the worker's employment status. *Jungles* does share one point in common with the Tenth Circuit's opinion. The Seventh Circuit in *Jungles* expressly stated that the worker's status as an employee or independent contractor was "immaterial". 903 F.2d at 476. The Tenth Circuit similarly stated that Mr. Kruger's work status is "irrelevant".[11] Petition, App. A, p. 5a.

The Krugers' reliance on *Jungles* is misplaced. The Tenth Circuit opinion and *Jungles* involve significantly different issues. The Tenth Circuit opinion and *Jungles* do not create a conflict on a common important matter. The Krugers' Petition should properly be denied.

IV. THE KRUGERS' DISAGREEMENT WITH THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION DOES NOT JUSTIFY A WRIT OF CERTIORARI.

The second question presented by the Krugers' Petition is whether a district court may grant a motion for summary judgment when there is a disputed material fact. The Krugers contend that the Tenth Circuit erred in affirming the district court's erroneous factual determination that they were not under duress when they executed the Termination Agreement. Petition, p. 10. The Krugers'

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[11] The Tenth Circuit opinion notes that "Manfred Kruger's employment status, . . . actually was never determined in – indeed, was irrelevant to – the district court's disposition". Petition, App. A, p. 5a.

summary judgment contention ignores the fact that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10. The Krugers' summary judgment contention concerns factual findings of the district court and should properly be rejected.

Sonic submitted seventeen separate statements of undisputed material facts to the district court as part of its motion for summary judgment. Sonic's undisputed facts were properly supported by reference to evidentiary materials submitted to the district court pursuant to Fed.R.Civ.P. 56. The Krugers' response to Sonic's motion for summary judgment failed to address and rebut any of the seventeen undisputed material facts submitted by Sonic. The district court granted Sonic's motion for summary judgment.

The Krugers appealed to the Tenth Circuit and contended that the district court improperly deprived them of their right to a jury trial and ignored pertinent facts. The Krugers attempted to present materials to the Tenth Circuit that were not presented to the district court. The Tenth Circuit rejected the Krugers' attempt to rely on matters outside of the record[12] and refused to sift through the record in search of evidence to support the Krugers' unsupported contentions on appeal. Petition (App. A), p. 4a.

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[12] For example, the Tenth Circuit rejected the Krugers' attempt to rely on an affidavit executed months after the district court's decision. Petition (App. A), p. 4a.

The Krugers' summary judgment issue is insufficient to justify granting a petition for certiorari. The Krugers' Petition should properly be denied.

CONCLUSION

Based on the foregoing reasons, Respondent, Sonic Restaurants, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: May 7, 1997

Respectfully submitted,

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